IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.885 OF 2003
IN
SUMMARY SUIT NO.2664 OF 2003

Yadu Commercial Ltd. Plaintiff

versus

Leela Estate - formerly known as Vora Estate Defendants

Ms.Sidhwa for plaintiff.

Mr.Parikh for defendants 1 and 2.

Mr.Jain for defendants 3 to 5.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 26th July 2005

PC :

1. Heard Ms.Sidhwa appearing for plaintiff, Mr.Parikh appearing for defendants 1 and 2 and Mr.Jain appearing for defendants 3 to 5. Defendant no.3 has expired.

2. The summary suit is filed to recover a sum of Rs.66,89,616/- as per particulars of claim as per Exhibit-D.

3. Ms.Sidhwa appearing for plaintiff contends

that the first defendant is a partnership firm of which defendants 2 to 5 are partners. They approached the plaintiff for temporary financial assistance. On accepting this proposal, the plaintiff advanced Rs.60.00 lakh by cheques drawn in favour of first defendant. It is contended by her that the loan was to carry interest @ 21% p.a.. It is contended by the plaintiff that defendants have executed a Bill of Exchange dated 29th September 1997. This Bill of Exchange also contains a stipulation for interest. It is further contended by her that out of the total amount of Rs.60.00 lakh, defendants paid from time to time a sum of Rs.27.50 lakh leaving balance of Rs.32.50 lakh. As on 31st March 2003, total interest accruing on principal amount on reducing balance method was Rs.58,16,125/- and out of which defendants paid a sum of Rs.23,60,253/-. The TDS certificate evidencing deduction of Rs.1,86,881/- was also forwarded and now Rs.32,68,991/- is the balance interest. This is how the claim is computed.

4. It is contended that towards part payment of sum of Rs.65,18,991/- defendant no.1 issued a cheque bearing No.843269 dated 17th March 2003 for Rs.60.00 lakh. The cheque was dishonoured by

the bank of defendants with the remark "refer to drawer". It is contended that during the course of proceedings under section 138 of Negotiable Instruments Act, some payment towards interest was made which was accepted by the plaintiff without prejudice to their rights and contentions. Thus, on the basis of the bill of exchange and the dishonoured cheque, present summary suit has been instituted and according to Ms.Sidhwa claim is maintainable under Order XXXVII of CPC.. If the date of cheque and its presentation are taken into account, then the claim is not barred by limitation. Therefore, she prays for a decree against defendants.

5. Mr.Parikh, learned advocate appearing for defendants 1 and 2 has contended that the present summary suit is not maintainable. He submits that there is no averment in the plaint which would demonstrate that the suit is either on bill of exchange/negotiable instrument or the claim arises on a written contract or on an enactment wherein plaintiff seeks to recover a debt or liquidated sum in money with or without interest. On the other hand, the suit is based on the original cause of action,w namely the friendly loan and admittedly no terms thereof are reduced

in writing. Such a suit is not maintainable as a summary suit. Therefore, unconditional leave to defend be granted. In support of this submission, reliance is placed upon an unreported judgement of this Court in Special Civil Application No.938 of 1967 (Coram : Mody and Madon, JJ.).

6. It is then contended by Mr.Parikh that insofar as merits of the claim is concerned, admittedly there is an averment that some amounts have been received during proceedings under section 138 of Negotiable Instruments Act. If that be the case, then obviously, plaintiff cannot recover the amounts covered by cheques and/or subject matter of those proceedings in this summary suit. He contends that as far as interest is concerned, there is a serious dispute inasmuch as neither is there any agreement to pay interest nor a demand raised in accordance with law to make payment of the same @ 21% p.a.. He also states that the cheque of Rs.60.00 lakh was not to be deposited and this is clear from the statements in paras 7 and 8 of the affidavit. Additionally, he submits that if the cheque is not construed as payment or acknowledgement of the liability, then the claim is barred by

limitation as well. These contentions of Mr.Parikh are supported by Mr.Jain. Reliance is placed by them also on the rejoinder affidavits which are filed and certain statements of accounts annexed thereto.

7. In my view, as far as issue of maintainability of present suit is concerned, the judgement relied upon by Mr.Parikh cannot have any application. In the present case, if the plaint averments are read as a whole, mere omission on the part of the plaintiff in stating that the claim arises on a bill of exchange or on acknowledgement of liability arising out of a written contract, would not be fatal. The basis of the claim is payment under a bill of exchange, execution of which, is not disputed. It is clear that there is a bill of exchange which is executed on 29th September 1997. It is further averred that payment of interest has been made by the defendants, as set out in para 5. It is after acknowledging the liability that a cheque was handed over. The cheque was dishonoured on 20th March 2003. In a decision reported in AIR-2003-Bombay-168, brother Vazifdar, J. has after noticing the decisions in the field including judgement of this Court reported in

AIR-2001-Bom-116, has held thus :-

"32. In R.Kumar & Company v. Chemicals unlimited, AIR 2001 Bombay 116 Kochar, J. dealt with a Summons for judgement in which the plaintiff based its cause of action on three letters, addressed by the Defendant to the Plaintiff, standing that in the account of the Plaintiffs certain amounts were shown as due by them to the Plaintiffs. In that case, the Defendant had also issued a T.D.S. Certificate the learned Judge held in paragraphs 10 and 14 as under :

> 10. 'According to me, to take any other narrow, pedantic or technical view of the matter would be to encourage dishonesty and immorality in life. I fail to understand how the defendants having written to the plaintiffs that certain amounts were shown payable by the defendants to the plaintiffs, can now turn about and say that no suit will lie for recovery of the said amounts shown to be the liability of the defendants towards the plaintiff. To accept such contention would amount to encourage and accept dishonesty and immorality.'
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> 14. 'In our case, the defendants have themselves addressed the three letters to the plaintiffs pointing out to the plaintiffs the amount stated in their books of accounts to be their liability towards the plaintiffs. I fail to understand why this admission cannot be taken as the basis of a summary suit as an admitted or liquidated claim. The defendants on their own, voluntarily, informed the plaintiffs that the balance in the plaintiffs account as shown was payable by the defendants to the plaintiffs. An honest and straight forward businessman writes to the creditor that the latter is entitled to receive a certain amount from the former. In these circumstances, I am at loss to understand why no summary suit would lie on such a clear cut admission. To take any other view would be contrary to the honest and moral view of the law."

> The learned Judge went on to pass a decree in favour of the Plaintiff at the stage of the hearing of the Summons for judgement.'

33. The judgement squarely apply to the present case. The authorities have uniformly held that an unconditional acknowledgement implies a promise to pay because that is the natural inference, if nothing is said to the contrary. In the present case there is no express agreement by the Defendant to pay any amount to the plaintiff. The unconditional confirmation/acknowledgement of the closing balance constitutes an implied promise by the defendant to pay the same. The suit is maintainable as a Summary Suit.

40. There is nothing, apart from the counsels submission, that this agreement to pay interest was restricted to the period for which it was to be paid. If interest has been paid in the past and the balance is confirmed by the debtor and the creditor, then subject to anything to the contrary it would imply a promise to continue to pay interest at that rate on the balance confirmed. It is not necessary in such circumstance for an express and independent stipulation that the balance therein would be paid with interest. This must be implied. To hold to the contrary would run counter to the basis on and the purpose for which parties have accounts stated and deprive such documents of any commercial efficacy.

. A catena of judgements of various Courts has affirmed the principle that implied in an account stated or accepted or settled is a promise to pay. The Privy Council in Bishun Chand v. Girdhari Lal, AIR 1934 PC 147 (affirmed by the Supreme Court in Gordon Woodroffe's case (AIR 1967 SC 181) (supra) observed that an account stated gave rise to a promise to pay and was one of the most ordinary business facilities which has been common to everybody who carries on business under any system which incorporates any of the ordinary principles of English Contract Law. To hold that when an account stated contains intrinsic evidence of the rate at which interest has been paid and received without demur does not imply a promise to continue to pay interest at that rate would render this facility otiose and denude the commercial efficacy of such

documents recognised by these judgements."

8. In my view, once bill of exchange has been executed and payment of interest is made by cheque as also TDS certificates have been forwarded, then it is not open to contend that the claim is not maintainable under Order XXXVII of CPC or that there is no acknowledgement of the liability. Therefore, the decision of this Court wherein there is absolutely no discussion as to whether the plaintiff was suing on the basis of aforesaid materials, can have no application. The first objection to the maintainability, therefore, must fail.

9. However, there is some substance in the contention of defendants insofar as liability of payment of interest is concerned. My attention has been invited to the averments in the plaint as also to the particulars of claim and it is contended that there is absolutely no reference to payments which were made during pendency of the proceedings under section 138 of Negotiable Instruments Act. If payment is made admittedly and statement of account is now sought to be annexed to the affidavit in rejoinder, then as far as quantum of interest is concerned, an

arguable case is made out. It is not as if the rate of interest is only disputed. It is also contended that the plaintiff would not be entitled to recover principal and interest and again interest over the same. That is how the particulars of claim are set out, according to Mr.Parikh and Mr.Jain. In my view, considering the aforesaid submission and with a view to afford opportunity to the defendants to substantiate their pleas, an order of conditional leave would meet the ends of justice. Mr.Parikh and Mr.Jain have not seriously disputed the liability as far as principal sum is concerned. That is Rs.32 lakh and odd. However, interest is paid for a considerable period. Hence, following order.

10. ORDER :- On the defendants 1, 2 4 and 5 depositing in this Court a sum of Rs.40.00 lakh within a period of 16 weeks from today, conditional leave to defend. Needless to state that if the amount is not deposited further consequences in law would follow. On the deposit being made, suit shall stand transferred to the list of commercial causes with usual directions to file written statement, inspection and discovery.

(S.C.DHARMADHIKARI, J.)